Filed 4/30/13 In re C.R. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re C.R., a Person Coming Under the Juvenile Court Law.	H038372 (Santa Clara County Super. Ct. No. JV38597)
THE PEOPLE, Plaintiff and Respondent, v. C.R., Defendant and Appellant.	

Minor C.R. appeals a May 2010 order declaring him a ward of the court under Welfare and Institutions Code section 602 after the trial court sustained a petition alleging that he committed three counts of a lewd act on a child under the age of 14 without the use of force, fear, menace or duress in violation of Penal Code section 288, subdivision (a).

On appeal, C.R. asserts there is not substantial evidence to support a finding under Penal Code section 26 that he knew the wrongfulness of his conduct. In addition, C.R. argues there is insufficient evidence to prove the element of specific intent to arouse lust or sexual desire as required under Penal Code section 288, subdivision (a).

STATEMENT OF THE FACTS AND CASE

L.F. and C.R. were friends. C.R. was about three and a half years older than L.R. L.R. stated that he knew C.R. and his family because they attended the same church, and L.F. would go over to C.R.'s house to play. L.F. stated that when he was "about" five or six-years-old, and C.R. and L.F. were alone in C.R.'s bedroom, C.R. would ask L.F. to suck his penis. C.R. did not threaten L.F. or act mean to him. L.F. stated they both would pull down their pants, and take turns sucking each other's penises. The oral copulation between the two boys happened about three times before C.R. and his family moved out of the area in 2008. C.R. and his family returned to the area in 2010, and L.F, who was eight or nine-years-old at the time, said the oral copulation happened between the boys two more times. Sometimes, when L.F. would tell C.R. he did not want to participate, C.R. would respond "Okay," or "We can do it later." C.R. told L.F. to keep their activity a "secret."

Eventually, L.F. told his mother what had happened between him and C.R. L.F.'s mother called the police. L.F. said that he thought C.R.'s penis would get hard when L.F. orally copulated him. However, when L.F. talked to the investigating officer, he said he did not remember whether C.R.'s penis would get hard.

In April 2012, a petition was filed under Welfare and Institutions Code section 602 alleging C.R. committed three counts of lewd and lascivious conduct on a child under the age of 14 in violation of Penal Code section 288, subdivision (a). Following a contested jurisdictional hearing, the court found all of the allegations in the petition true, and made the following specific findings: "The court has carefully considered all of the testimony . . . and makes the following findings. . . . And it's my finding that the allegations of the petition have been proven beyond a reasonable doubt, and the court will sustain each and every one of the counts that are alleged in the petition. The court also finds that the petition will be sustained as to each and every count, and each is sustained

as a felony. . . . [¶] . . . [¶] . . . I know a lot of things about being young and being old, about learning and experiencing. And I think what took place in that house wasn't something that was nefarious in the grand scheme of things. . . . [¶] . . . [¶] It wasn't evil. It wasn't necessarily bad in the sense that as adults, we think of sexual activity that's forced or that's violenced [*sic*] or that's imposed on someone is something that's considerably unacceptable. As young people, you experiment with sex. [¶] At a certain age you learn, you're curious, and things happen. Sometimes they get out of control, and sometimes you don't think about them until after the fact. And as time goes by, you realize, through experience, that you did something that you shouldn't have done. That isn't something that you should necessarily, in the grand scheme, let it define your life and who you are. [¶] Kids experiment with sex. I think you and this young man were experimenting with sex, and I think it just was something that got out of control….I think based on the evidence it's clear to me that something did happen, and what happened was what was described by this young man. And I think the proof is there from a legal standard, beyond a reasonable doubt, that the charges have been sustained."

The court adjudged C.R. a ward of the court and placed him on probation in his parents' custody. C.R. filed a timely notice of appeal.

DISCUSSION

C.R. challenges the sufficiency of the evidence in two respects. First, he contends the record does not contain substantial evidence that he knew the wrongfulness of his conduct pursuant to Penal Code section 26. Second, he argues there is insufficient evidence to prove the element of a specific intent to arouse lust or sexual desire as required under Penal Code section 288, subdivision (a).

In assessing a claim of insufficiency of evidence, the reviewing court's task is to "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible,

and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

"The trier of fact, not the appellate court, must be convinced of the minor's guilt, and if the circumstances and reasonable inferences justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citation.] This standard of review applies with equal force to claims that the evidence does not support the determination that a minor understood the wrongfulness of his conduct." (*In re James B.* (2003) 109 Cal.App.4th 862, 872.)

Sufficiency of the Evidence Under Penal Code Section 26

C.R. was under the age of 14[1] during the commission of the offenses in this case; therefore, he is subject to the presumption under Penal Code section 26, which provides in pertinent part: "All persons are capable of committing crimes except those belonging to the following classes: [¶] One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."

[1] Based on the evidence in the record, the sexual activity between the boys occurred when C.R. was eight or nine-years-old and 11 or 12-years-old, possibly 13, respectively. This conclusion is based on the boys' birthdates of November 19, 1996 for C.R. and July 25, 2000 for L.F., and L.F.'s statement about his age at the time of the events. The Attorney General's argument suggesting this court could conclude that C.R. was actually 14 at the time of the latter incidents is not supported by the record.

"[I]n order to become a ward of the court under [section 602], clear proof must show that a child under the age of 14 years at the time of committing the act appreciated its wrongfulness. This conclusion follows from the statutory postulate that the jurisdiction of the court must rest upon a violation of a law that defines crime and from the further statutory requirement of Penal Code section 26, subdivision One, that, by definition, a child under the age of 14 years does not commit a crime in the absence of clear proof that he 'knew its wrongfulness.' " (*In re Gladys R.* (1970) 1 Cal.3d 855, 862, fn. omitted.) " 'Section 26 embodies a venerable truth, which is no less true for its extreme age, that a young child cannot be held to the same standard of criminal responsibility as his more experienced elders[.]' However, 'the presumption of a minor's incapacity [may] be rebutted by clear and convincing evidence' that the minor defendant knew the act's wrongfulness.' [Citation.]" (*People v. Lewis* (2004) 26 Cal.4th 334, 378.) "Only if the age, experience, knowledge, and conduct of the child demonstrate by clear proof that he has violated a criminal law should he be declared a ward of the court under section 602." (*In re Gladys R., supra,* 1 Cal.3d at p. 867.) "Although a minor's knowledge of wrongfulness may not be inferred from the commission of the act itself, 'the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment' may be considered. [Citation.] Moreover, a minor's 'age is a basic and important consideration [citation], and, as recognized by the common law, it is only reasonable to expect that generally the older a child gets and the closer [he] approaches the age of 14, the more likely it is that [he] appreciates the wrongfulness of [his] acts.' [Citation.]" (*People v. Lewis, supra,* 26 Cal.4th at p. 378.)

Here, the prosecution did not present any specific evidence regarding the presumption in Penal Code section 26, and made no arguments to that effect. Indeed, the prosecutor stated at trial, "It does not appear to me that [C.R.] is a predator. It appears to me that [C.R.] was engaged in *sexual experimentation* with [L.F.] . . . ." These

arguments suggest that C.R. did not understand the wrongfulness of his conduct sufficient to overcome the presumption in Penal Code section 26.

In considering the evidence in the record, C.R. was about eight and a half to nine when the incidents began and about 12 and a half to 13 when the final incident occurred. While there is evidence he told L.F. to keep their activity a "secret," this alone does not establish that C.R. understood the conduct was wrongful. (See, e.g. *In re Cindy E.* (1978) 83 Cal.App.3d 393, 399 ["[A] child under 14 years of age is [presumed] incapable to entertaining criminal intent."]) In addition, C.R. had no prior contact with law enforcement before these incidents, nor had he been a disciplinary problem at school. (See, e.g., *In re Clyde H.* (1979) 92 Cal.App.3d 338, 344 [the child's prior involvement in similar offenses and repeated warnings that such conduct were wrong were compelling circumstances from which the trial court would infer the requisite knowledge of wrongfulness to satisfy Penal Code section 26]) Finally, there was no evidence presented that C.R. knew or was taught that sexually touching another child was wrong. (See, e.g., *In re Jerry M.* (1997) 59 Cal.App.4th 289, 298-299 [substantial evidence supported the finding that the 11-year-old minor was competent under Penal Code section 26 to violate Penal Code section 288, based on his age, the fact his parents taught him sexual touching was wrong, and circumstances of the offense.])

In this case, the court made no specific finding that C.R. understood the wrongfulness of the conduct, nor did it comment about the presumption in Penal Code section 26. Indeed, the court's findings were directly *contrary* to a conclusion that C.R. understood the wrongfulness of his conduct, when it stated that the activity between the boys was *not* "nefarious" and was *not* "evil," and that the two "were experimenting with sex . . . ." Criminal conduct is by its very nature nefarious. The court's conclusion to the contrary demonstrates it did not find by clear and convincing evidence that C.R.

understood the wrongfulness of his conduct. The presumption in Penal Code section 26 has not been overcome in this case, and the judgment must be reversed.[2]

DISPOSITION

The judgment is reversed.

_____

RUSHING, P.J.

WE CONCUR:

_____

PREMO, J.

_____

ELIA, J.

[2] Because we are reversing the judgment for failure to overcome the presumption in Penal Code section 26, we will not address C.R.'s additional argument that there was no substantial evidence to support a finding that he had the specific intent to arouse the lust or sexual desire of himself or L.F.